IN THE MICHIGAN SUPREME COURT

IN THE MATTER OF MAYS
Minor children

DEPARTMENT OF HUMAN SERVICES,
Petitioner-Appellee

Lower Court No.: 09-485821-NA
Court of Appeals No.: 297447
Supreme Court No.: ~~142568~~ 142566

v.

WALI PHILLIPS
Respondent-Appellant

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RESPONDENT-APPELLANT'S REPLY BRIEF

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ARGUMENT

The central issue in this appeal is whether the Constitution permits a court to terminate a non-respondent parent's[1] rights to his children based solely on that parent's technical non-compliance with a service plan without an underlying finding of unfitness. Neither the Department of Human Services ("DHS") nor the Lawyer-Guardian Ad Litem ("L-GAL") provides a constitutional defense to this practice. The DHS fails to address the seminal United States Supreme Court cases discussing the constitutional requirement that a parent be found unfit prior to any deprivation of his custodial rights, see *Stanley v Illinois*, 405 US 645; 92 S Ct 1208; 31 L Ed 2d 551 (1972), and instead summarily dismisses Mr. Phillips' constitutional arguments as "platitudes." DHS Br. at 15. The L-GAL fails to address how compliance with a treatment plan is a constitutionally-sound basis to measure a non-respondent parent's fitness.

Rather than addressing the core constitutional concerns implicated in this case, the DHS and the L-GAL try to sidestep the issue in several ways. For example, the DHS and L-GAL misapply the holding in *In re Hatcher*, 443 Mich 426; 505 NW2d 834 (1993), and argue that non-respondent parents who fail to appeal initial dispositional orders cannot invoke the constitutional protection requiring the State to make an individualized finding of their unfitness. *Hatcher* did not address this question. The DHS – relying on unproven petition allegations in its initial jurisdiction petition – also claims that Mr. Phillips conceded that he was unfit but in other parts of its brief admits that he never received a trial on the allegations it now relies upon.

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[1] Throughout its brief, the DHS uses the phrase "non-respondent parent" interchangeably with "non-custodial parent." DHS Br. at 8, 10, 13, 15. The fact that Mr. Phillips was the non-custodial parent of the children is not the relevant factor. As a non-custodial parent who was involved in his children's lives, he still retained constitutional protection. See *Lehr v Robertson*, 463 US 248, 261; 103 S Ct 2985; 77 L Ed 2d 614 (1983) ("When an unwed father demonstrates a full commitment to the responsibilities of parenthood by [coming] forward to participate in the rearing of his child, his interest in personal contact with his child acquires substantial protection under the Due Process Clause."). Mr. Phillips' status as a "non-respondent parent," against whom no allegations of unfitness were proven, is what is important to this inquiry.

Similarly, the DHS and the L-GAL minimize the importance of key statutory protections enacted to ensure that a termination of parental rights ("TPR") furthers the best interests of children. Neither offers any evidence that the views of Mr. Phillips' daughters regarding their permanency were ever elicited by the trial court. Surprisingly, the L-GAL, tasked with representing the best interests of these children, downplays the importance of his own clients' views in the process and simply excuses the failure of the trial court and the trial L-GAL to elicit the children's preferences for permanency as required by law. L-GAL Br. at 47. The plain language of MCL 712A.19a mandates courts to take this basic step, among others,[2] to ensure that this most severe sanction – the permanent separation of this family – furthers the interests of children.

In short, the positions adopted by the DHS and the L-GAL would undermine important constitutional and statutory protections that prevent the erroneous termination of the parent-child relationship. This is precisely why this Court's review of these issues is needed and the termination of Mr. Phillips' parental rights should be reversed.

I. The DHS And The L-GAL Fail To Address The Constitutionality Of The "One Parent" Doctrine, Which Allows Courts To Terminate The Rights Of Non-Respondent Parents Without An Underlying Unfitness Finding Based On Non-Compliance With A Service Plan.

The DHS and the L-GAL offer no constitutional defense to the application of the "one parent" doctrine, which permits trial courts to order a non-respondent parent to comply with a service plan and then terminate that parent's rights solely based on non-compliance with the plan. They do not confront *Stanley's* holding that the State must make an individualized finding

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[2] As detailed in the Appellant's Brief, the trial court also failed to adequately consider the children's placement with their grandmother, who supported reunification efforts, before ordering the DHS to file a TPR petition. Appellant's Br. at 30-31. As this Court explained in *In re Mason*, 486 Mich 142, 158; 782 NW2d 747 (2010), this consideration is required pursuant to MCL 712A.19a(6)(1).

of unfitness against a parent prior to infringing upon his custodial rights. *Id.* at 649. Rather, they attempt to rewrite constitutional principles by summarily arguing that the State's need to prove a parent's unfitness dissipates once an adjudication is made against the other parent. In their view, a court may "take extraordinary steps in that child's best interests, even if that means orders entered against an adult who did not trigger the court's jurisdiction." DHS Br. at 12.

The law, however, requires that a parent must be found to be unfit before the State can infringe upon his custodial rights. Holdings in this Court and the United States Supreme Court make this clear. See, e.g., *Stanley*, *supra* at 649; *Hunter v Hunter*, 484 Mich 247, 270; 771 NW2d 694 (2000) ("[T]he state must show that the natural parent is unfit."); *In re Clausen*, 442 Mich 648, 687; 502 NW2d 649 (1993) ("the mutual rights of the parent and child come into conflict only when there is a showing of parental unfitness"). This is precisely why most jurisdictions – contrary to the assertions by the DHS and the L-GAL – prevent the State from presuming the unfitness of non-respondent parents based solely on findings against the other parent.[3]

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[3] See, e.g., *Meryl R v Ariz Dep't of Econ Sec*, 992 P2d 616, 618; 196 Ariz 24 (1999) (finding that the court correctly dismissed a dependency case because the child had a noncustodial father who was ready and willing to parent him); *In re Austin P*, 118 Cal App 4th 1124, 1128; 13 Cal Rptr 3d 616 (2004) (applying California statute that instructs courts to place children with non-respondent parents absent detriment finding); *People v AH*, __ P2d __ ; 2011 Colo App LEXIS 1050 (2011) (ordering return of child to parent because the father had not been adjudicated); *People ex rel US*, 121 P3d 326, 328 (Colo Ct App 2005) ("Nothing in the statute grants a court the power to impose a treatment plan on a parent when the child has not been found to be dependant and neglected by that parent."); *JP v Dep't of Children and Families*, 855 So 2d 175 (Fla Dist Ct App 2003) (recognizing requirement to transfer physical custody of the child to the non-offending parent); *In re MK*, 649 NE2d 74, 80-82; 271 Ill App 3d 820 (1995) (permitting court to take jurisdiction over child based on conduct of one parent but finding that custody of child should be awarded to fit parent); *In re Sophie S*, 891 A2d 1125, 1133; 167 Md App 91 (2006) (noting that where one parent is "able and willing" to care for child, a court may not adjudge child to be in need of assistance); *In re Russell G*, 672 A2d 109, 114; 108 Md App 366 (1996) ("A child who has at least one parent willing and able to provide the child with proper care and attention should not be taken from both parents and be made a ward of the court."); *In the Interest of Amber G*, 250 Neb 973, 984; 554 NW2d 142 (1996) ("While it is true that the juvenile court has broad discretion to determine placement, that discretion is limited by the presumption in favor of the biological parent. Absent an affirmative finding of unfitness, the father is entitled to custody of his children."); *In re Bill F*, 761 A2d 470, 476; 145 NH 267 (2000) (finding that the court must give non-respondent parent full hearing at which the State must prove unfitness prior to deprivation of physical custody); *New Mexico ex rel. Children Youth & Families Dep't v Benjamin O*, 160 P3d 601, 609-610; 141 NM 692 (2007) (reversing TPR because trial court did not consider placement with unadjudicated father); *In re JAG*, 617 SE2d 325, 332; 172 NC App 708 (2005) (finding that the trial

Here, the trial court terminated Mr.Phillips' rights to his daughters without an underlying finding of unfitness. The court ordered the TPR based primarily on his non-compliance with his service plan despite the fact that it never made any unfitness findings demonstrating why he needed any services. His failure to comply with the services could not serve as a constitutionally-sound basis for measuring his fitness. As aptly noted by the Washington Court of Appeals in reversing a TPR decision against a non-respondent parent, "The availability of rehabilitative services is irrelevant to a parent who has not been found to have parental deficiencies. . . Without a problem, there can be no solution." *In the Matter of SG*, 166 P3d 802, 805-806; 140 Wn App 461 (2007), 346a-350a.

Rather than explaining how compliance with a service plan can serve as a basis for finding a non-respondent parent to be unfit, the DHS and L-GAL make two arguments. First, they argue that Mr. Phillips' should be precluded from raising this issue because he failed to appeal the initial dispositional order. DHS Br. at 10; L-GAL Br. at 26. They assert that he waived his constitutional right to have the State prove him unfit prior to the termination of his parental rights and instead consented to a process by which a future TPR could be based on his compliance with a generic service plan, even though no unfitness findings supported the creation of the plan.

The law does not support their waiver argument. Waiver is the intentional relinquishment or abandonment of a known right or privilege. *People v Williams*, 475 Mich 245, 260; 716 NW2d 208 (2006). Courts "indulge every reasonable presumption against waiver of fundamental constitutional rights." *Id.* (citing *People v Williams*, *supra*). Waiver consists of (1)

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court erred in denying fit parent physical custody); *In re ML*, 757 A2d 849, 851; 562 Pa 646 (2000) (finding that "a child, whose non-custodial parent is ready, willing and able to provide adequate care to the child cannot be found to be dependent."); *In re NH*, 373 A2d 851, 856; 135 Vt 230 (1977) (permitting adjudication of child as neglected based on findings against one parent but mandating that child be placed with other parent absent evidence of unfitness).

specific knowledge of the constitutional right and (2) an intentional decision to abandon the protection of the constitutional right. *Id.* at 261.

Here, there was no evidence that Mr. Phillips had waived his constitutional right to an individualized finding of unfitness against him prior to the termination of his parental rights. At the initial dispositional hearing on May 12, 2009, the trial court never advised Mr. Phillips of his constitutional protections, and there was no evidence that he decided to abandon these safeguards. The goal in the case at that time was reunification, and the trial court never mentioned the possibility of a future TPR at the hearing. Nothing Mr. Phillips did at the hearing can be construed as an intentional decision to abandon his constitutional rights.

In contrast, MCR 3.971 requires the trial court to advise a respondent parent of a number of rights prior to entering a plea for jurisdiction, such as "the consequences of the plea, including that the plea can later be used as evidence in a proceeding to terminate parental rights if the respondent is a parent." In this case, the trial court went beyond the court rule before accepting Ms. Mays' plea to jurisdiction. The court stated, "Now, if your children are made temporary court wards, and you're given a treatment plan then we would expect you to engage in those services."[4] 62a. The court further instructed that she "would be given a treatment plan" and "[i]f a year goes by and for whatever reason we're not able to return your children to your care, then the State might be required to file another petition asking that your rights as parent be terminated permanently." 61a-62a. The court never told Mr. Phillips of these potential consequences at any hearing and, in fact, did not even afford him the proper written notice before the purported

[4] Contrary to the assertions of the DHS, DHS Br. at 14, Mr. Phillips did not have proper notice of the adjudication hearing on April 28, 2009, where Ms. Mays was advised of her rights. At that hearing, the trial court found that Mr. Phillips had not been properly served with an amended petition and continued the adjudication as to Mr. Phillips. 54a, 56a ("We're going to continue this for the father because we don't have evidence that he was legally served with a copy of the amended petition."). He was only served with the amended petition at the dispositional hearing held on May 12, 2009. 92a.

permanency planning hearing ("PPH") on October 27, 2009, where the court *sua sponte* ordered the filing of the TPR petition. MCL 712a.19a requires that notice for a PPH inform the parent that "the hearing may result in further proceedings to terminate parental rights." This notice was never given.

The DHS and the L-GAL rely heavily on this Court's decision in *In re Hatcher*, *supra,* in arguing that Mr. Phillips waived his constitutional right to an individualized unfitness finding. *Hatcher*, *supra*, however, did not address this issue. In *Hatcher*, *supra*, a father affirmatively entered into a stipulation to the court's assumption of jurisdiction over his son. *Id.* at 430. On appeal, Mr. Hatcher relied primarily on a technical argument challenging the legality of his initial stipulation to jurisdiction. *Id. at 432.* This Court properly held that his challenge – which had nothing do with the validity of the court's unfitness finding – was barred because he could have raised that issue on direct appeal. *Id.* at 444.

Here, Mr. Phillips is not collaterally attacking the assumption of jurisdiction. He is challenging the court's finding that his failure to comply with a service plan without underlying proof of parental deficiencies constituted clear and convincing evidence of unfitness. That – not a challenge to the assumption of jurisdiction – is the crux of the appeal.

Next, the DHS and the L-GAL argue that the trial court's actions satisfied due process because Michigan statutes and court rules empower courts to issue orders against any adults once jurisdiction is obtained over a child. Not only do they fail to respond to the constitutional implications of such a broad grant of authority to courts, they ignore language in key statutory provisions that explicitly limits the court's authority. For example, although MCL 712A.6 permits courts to issue "orders affecting adults," those orders must be "necessary" for the child's

well-being and must be "incidental to the jurisdiction of the court over the juvenile."[5] Similarly, MCL 712A.18, which enumerates the orders a court may enter at a dispositional hearing after the court assumes jurisdiction, mandates that those orders be entered into only "in view of the facts proven and ascertained." MCL 712A.18(1). For non-respondent parents, no such facts exist. Any ambiguity in the interpretation of these statutes must be interpreted in a manner that preserves their constitutionality. *People v Neumayer*, 405 Mich 341, 362; 275 NW2d 230 (1979).

II. The DHS And The L-GAL Fail To Identify Any Evidence In The Record That The Children's Views Regarding The Permanency Plan Were Elicited By The Trial Court Or The L-GAL.

Neither the L-GAL nor the DHS provide any evidence that the children's views regarding their permanency were elicited by the trial court. The L-GAL concedes that the trial court failed to do this. L-GAL Br. at 47-48. The DHS suggests that the foster care worker's testimony that the children "were doing well in their placement" and the L-GAL's conclusion that "termination was appropriate" somehow met the statutory mandate that the trial court "obtain the child's views regarding the permanency plan." MCL 712A.19a(3). There, however, is simply no proof anywhere in the record that the L-GAL complied with his statutory mandate to "inform the court as to the child's wishes and preferences." MCL 712A.17d(1)(i).

Rather than demonstrate how the trial court complied with this requirement, the DHS and the L-GAL instead attempt to undermine the importance of the provision by questioning the need for children to have input into their own permanency. DHS Br. at 34-35; L-GAL Br. at 48.

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[5] See *In re Macomber*, 436 Mich 386; 461 NW2d 671 (1990) ("The word 'necessary' is sufficient to convey to probate courts that they should be conservative in the exercise of their power over adults."); *State Fire Marshall v Lee*, 101 Mich App 829, 834; 300 NW2d 748 (1980) (adopting Black's Law Dictionary of incidental to mean "[d]epending upon or appertaining to something else as primary; something necessary, appertaining to, or depending upon another which is termed the principal; something incidental to the main purpose.").

They overlook the fact that this law was prompted by federal child welfare legislation that recognized that children must play an important role in any permanency decision.[6] As noted in the report on the legislation drafted by the House Committee on Ways and Means, "[e]ach child deserves the opportunity to participate and be consulted in any court proceeding affecting his or her future, in an age-appropriate manner."[7]

This case only exemplifies the need for such legislation. The court-appointed L-GAL never shared the children's views with the court as required by law. MCL 712A.17d(1)(i). There is no evidence that Zoey Mays, who was eleven years old at the time of the permanency planning hearing, received notice of the hearing as required by MCL 712A.19a(4)(a). The trial court never obtained the children's views about permanency as mandated by MCL 712A.19a(3). By concluding that the TPR was in the children's best interests without ever considering the views of those it was mandated to help, the trial court committed clear error.

III. Contrary To The Agency's Assertions, There Was No Evidence That Mr. Phillips Was Unwilling Or Unable To Care For His Children.

In its brief, the DHS confuses allegations with facts in an attempt to paint Mr. Phillips as an uncaring father who wanted to abandon his daughters. Throughout its brief, the DHS relies heavily on allegations it made in its initial petition and offers them to this Court as substantive evidence proving Mr. Phillips' unfitness. DHS Br. at 3, 8, 12, 14, 31, 36. See *In re AMB*, 248 Mich App 144, 183; 640 NW2d 242 (2001) ("In many cases the allegations in the petition do not always fully represent the situation."). For example, on page three of its brief, the DHS writes,

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[6] PL 109-299, Child and Family Services Improvement Act of 2006. The particular provision requiring courts to consult children about their permanency is contained in 42 USC § 675(5)(C).

[7] The complete report is available at http://www.gpo.gov/fdsys/pkg/CPRT-109WPRT30479/html/CPRT-109WPRT30479.htm. Furthermore, Michigan's State Court Administrative Office issued a memorandum to state courts providing guidance on applying MCL 712A.19a(3). The memorandum notes that although the method of obtaining the child's view may be flexible, the court must obtain the views of children able to express them. The memorandum is available at http://courts.michigan.gov/scao/resources/other/scaoadm/2009/2009-02.pdf. 351a-354a.

"Phillips admitted that he could not have the children placed in his care." Yet, to support this claim, they only cite to the initial jurisdiction petition they filed in this case. DHS Br. at 3. Similarly, the DHS repeatedly asserts that Mr. Phillips admitted that he was unable to care for the children and declined the opportunity to have his children placed with him, but again only cites to the initial unproven allegations contained in its petition to support these assertions. DHS Br. at 8, 10, 12, 14, 31. While basing its argument on these unproven allegations, the DHS readily acknowledges in its brief that Mr. Phillips was a non-respondent parent and never received a trial on the allegations against him in its initial petition. DHS Br. at 13, 14, 30.

The DHS similarly mischaracterizes statements made by Mr. Phillips at the TPR hearing. In its brief, the agency claims that Mr. Phillips admitted that he visited his children "sporadically" and without "any regularity." DHS Br. at 5, 32. Yet the page in the record to which they cite reveals that Mr. Phillips never used the word "sporadically" in his testimony and testified that he visited the children "regularly." 232a. Similarly, the DHS asserts that Mr. Phillips testified that he "did not have any desire to have the children live with him." DHS Br. at 32. But at the final TPR hearing, Mr. Phillips only testified that he <u>had not</u> expressed a desire for the children to live with him. 238a. Mr. Phillips specifically testified that he wished to maintain custody of his daughters and that his children could certainly live with him in his sister's home. 239a-240a, 243a. Like many non-custodial parents, however, Mr. Phillips was also supportive of the children remaining in the care of their grandmother, where they were doing well. The efforts of the DHS to paint Mr. Phillips as an uncaring and uninvolved father who wished to abandon his children have no factual support in the record.

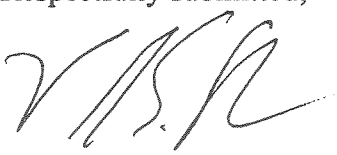
The DHS' efforts to characterize Mr. Phillips in this light are understandable given the dearth of evidence that he was unfit to parent his children. He did not have any prior criminal or

child protective history. 158a, 242a. He was a loving father whom the children called "dad," 232a, and had been a steady presence in the children's lives since their birth. Prior to the child protection case, Mr. Phillips supported and visited them on a regular basis. 204a. He bought clothes and shoes for them, and Ms. Mays could depend on him for support. 204a, 220a. After the children entered foster care, Mr. Phillips continued to stay involved in their lives. He provided "some income" to the children and visited them. 172a. The foster care case worker reported that the children benefited from the visits. 135a. Mr. Phillips maintained employment, 94a, 235a, and he actively participated in and completed a parenting class, at which the instructors concluded that he did not "appear to have any barriers at this time." 134a, 179a, 146a-147a. Mr. Phillips lived in stable housing at his sister's place, and his sister was willing to have the children come live in the home. 236a. No evidence was introduced indicating that the home was unsuitable in any way or that Mr. Phillips was unfit to raise his daughters.

CONCLUSION

For the foregoing reasons and for the reasons stated in his brief, Mr. Phillips respectfully requests that this Court reverse the trial court's decision terminating his parental rights.

Respectfully submitted,



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